



Atty Gen. Op. No. 10 - IB06

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July 15, 2010

Perry F. Goldlust, Esquire
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**RE: Freedom of Information Act Complaint
Against Delaware State University**

Dear Mr. Goldlust:

On May 21, 2010, the Delaware Department of Justice (DDOJ) received your May 20, 2010 letter alleging that Delaware State University (DSU) had violated the Freedom of Information Act, 29 *Del. C.* ch. 100 (FOIA), in refusing to provide you with public records. On May 24, 2010, we sent your complaint to DSU, and received their timely response on June 4, 2010. This is the DDOJ determination of your complaint, pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

In December 2009, while AFSCME Council 81, Local Unions 1007, 1267 and 2888 ("the Union") and DSU were negotiating a successor to their existing collective bargaining agreement, the Union filed an unfair labor practice complaint with the Delaware Public Employment Relations Board ("PERB") against DSU. In connection with that complaint, on March 23, 2010, you made a written FOIA request to DSU for

records that you stated were "needed to properly enforce terms and conditions of employment contained in the respective collective bargaining agreement." The records requested were:

1. For the period from FY 2007-FY 2010, copies of all notification bids, the scope of work to be performed, the cost of equipment, labor, materials, and profit allowed, the bids submitted, the document announcing the winner of the bid, a copy of the contract entered into by the University and the selected bidder.
2. For the period from FY 2007-FY 2010, copies of all announcements advertising the solicitation of the bids and all correspondence including, but not limited to, letters and emails referencing the various bids, offers and acceptance.
3. For the period from FY 2007-FY 2010, copies of all documents identifying the source of funding for the contracts awarded.
4. Documents for the period from FY 2007-FY 2010 showing the total amount paid to the contractors identified in response to requests 1 through 3 above and how much was actually paid to the contractor(s).
5. The number of employees laid off by the University as a result of the contracting of work to outside sources; i.e., mailroom, by way of example only.
6. A list of the funded positions included in the University's budget and submissions to the General Assembly I each of the three locals by job title for FY 2009, FY 2010 and FY 2011.
7. A list of positions by bargaining units that have been abolished in FY 2008, FY 2009, FY 2010 and projected for FY 2011.
8. A List of non-teaching positions that have been created during FY 2009, FY 2010 and budgeted for FY 2011.
9. The names and job titles of employees as well as rate of compensation paid to employees who were in the bargaining unit positions at the start of FY 2008 who were subsequently employed in positions outside of the bargaining unit and the compensation being paid to those employees.
10. Names of any employees in the bargaining unit that have received an increase in compensation outside of the negotiated increases starting with FY 2009 and continuing.
11. The names of employees and the position title for all employees that have left the employment of the University by voluntary and involuntary terminations including people retiring or who have died during FY 2008, FY 2009, and FY 2010.

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12. A list of all non-teaching positions funded by grant money and a copy of the grant application and the grant award that provide the funding for the non-teaching positions.

By email of April 5, 2010, DSU advised you that it would not produce any of the records because "they pertain to pending or potential litigation which are not records of any court," citing 29 *Del. C.* § 10002(g)(9).

On or about April 20, 2010, the Union filed another charge of unfair labor practice arising out of DSU's refusal to provide the documents requested, citing 19 *Del. C.* § 1307(a)(8) (unfair labor practice for public employer to deny any public record as defined by FOIA). Both the 2009 and the 2010 complaints are pending.

RELEVANT STATUTES

The Delaware Freedom of Information Act was enacted to so that "citizens have easy access to public records in order that the society remain free and democratic."¹ 29 *Del. C.* § 10001. FOIA requires that the public must have "reasonable access to" public records for "inspection and copying." 29 *Del. C.* § 10003(a). The only records of DSU that are public records for purposes of FOIA are "documents relating to the expenditure of public funds," 29 *Del. C.* § 10002(d), subject to the exclusions listed in 29 *Del. C.* § 10002(g). FOIA excludes from the definition of "public record" "[a]ny records pertaining to pending or potential litigation which are not records of any court[.]" 29 *Del. C.* § 10002(g)(9).

¹ While FOIA refers throughout to "citizens," restricting the rights created by FOIA to only citizens of Delaware has been held unconstitutional. *Lee v. Minner*, 458 F.3d 194 (2006). Therefore, we will use the term "public" rather than "citizens."

The General Assembly enacted the Public Employment Relations Act (PERA), 19 *Del. C.* ch. 13, "to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer." 13 *Del. C.* § 1301. To further those purposes, the General Assembly charged the PERB with the responsibility to "resolv[e] disputes between public employees and public employers . . ." arising under the PERA. *Id.* § 1301(3). PERB has the power and the duty "to prevent any unfair labor practice . . . and to issue appropriate remedial orders." 19 *Del. C.* § 1308(a). PERB has the authority to hold hearings, take depositions, and to subpoena records. 14 *Del. C.* § 4006(h)(2); 19 *Del. Admin. C.* § 3002 ¶ 7. The Court of Chancery hears appeals from PERB, and PERB may petition that court to enforce PERB's orders. 19 *Del. C.* § 1309.

DISCUSSION

The definition of a public record describes documents in existence at the time the request is made. 29 *Del. C.* § 10002(g). FOIA does not require DSU to create a document in response to your request. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975). According to DSU, there are no records in existence that respond to items 5-12 of your request. Therefore, it has not violated FOIA in not producing the information requested in items 5-12.

Items 1-4 ask for records that are public records: records created or received by DSU relating to the expenditure of public funds. DSU maintains that the 2009 PERB complaint is pending litigation, and that because items 1-4 pertain to that litigation, they are therefore not public records under 29 *Del. C.* § 10002(g)(9) (the exception to the

definition of "public record" for documents "pertaining to pending or potential litigation which are not records of any court"). The question for our determination is whether a PERB proceeding is "litigation" within the meaning of § 10002(g)(9).

A PERB proceeding resembles litigation, in that adversarial parties have their rights and responsibilities determined by a neutral body. However, PERB does not give the parties a right to discovery, that is, to a pre-hearing, formal exchange of information, for which a non-complying party can be sanctioned. While the PERB may subpoena records, exercise of the subpoena power would be discretionary. 14 *Del. C.* § 4006(h)(2). Unlike the civil court rules, neither the PERA, 19 *Del. C.* ch. 13, nor section 4006 of title 14 of the Delaware Code, nor PERB's rules, 19 *Del. Admin. C.* § 3002, provides for the parties to have a *right* to receive documents from the opposing party. *Cf.*, e.g., Super. Ct. Civ. R. 26 (discovery generally), 34 (discovery of documents), 37 (sanctions).

We have previously rejected the absence of discovery as determinative of whether administrative proceedings are litigation for purposes of FOIA, and focused on what we called the "quasi-judicial" character of an administrative proceeding. *Op. Att'y Gen. 03-IB10*, 2004 WL22931612 (Del. May 6, 2003) *reconsideration denied*, *Op. Att'y Gen. 03-IB26*, 2003 WL 22931613 (Del. Nov. 13, 2003) (county Planning Board); *see Op. Att'y Gen. 04-IB04*, 2004 WL 335476 (Del. Feb. 5, 2004)(arbitration proceeding). However, our focus should not be solely on the quasi-judicial nature of an administrative proceeding or on the availability of discovery as of right.

Instead, we should balance the public body's right to the exception with the public nature of the records requested. In this dispute, DSU's right to the exception is not clear. While it is arguable that, where a forum does not provide formal discovery, a party to a proceeding should not be able to use FOIA to improve his position, *see Office of the Public Defender v. Del. State Police*, 2003WL 1769758, at *3 (Del. Super. 2003) ("[T]he legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts' rules of discovery."), it is equally justifiable to say that the lack of discovery as of right distinguishes administrative proceedings from litigation. The rights FOIA creates are construed broadly, while the exceptions to those rights are construed narrowly. *Am. Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, at *3 (Del. Super. March 15, 2007); *see Del. Solid Waste Auth'y v. News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984). When considering two possible interpretations of FOIA, we have to favor disclosure. *See Layfield v. Hastings*, 1995 WL 419966, at *2-3 (Del. Ch. July 10, 1995).

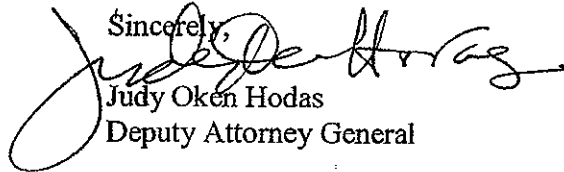
Moreover, the records in question are clearly of a public nature: they relate to the DSU's expenditure of public funds.² This is not a case where the benefit of disclosure is strictly private. *Cf., Office of the Public Defender, supra*. The public has an interest in a state university's expenditure of public funds. Because DSU does not have a clear right to the pending litigation exception, whereas the requested records are clearly public and their disclosure could have public significance, we find that the pending litigation exception does not apply.

² In fact, most of them are probably in the public domain.

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CONCLUSION

DSU did not violate FOIA by refusing to create records in response to your request numbers 5-12. However, the records described as items 1-4 are public records within the meaning of FOIA. DSU must promptly make those records available to you, although privileged or confidential matter may be redacted if DSU provides you with a brief description of and explanation for the redactions (for example, "email, X to Y, dated x/x/xx, attorney-client privilege").

Sincerely,

Judy Oken Hodas
Deputy Attorney General

Approved:


Lawrence W. Lewis, State Solicitor

cc: Opinion Coordinator
Sarah E. DiLuzio, Esquire